

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

JOSE CARLOS CAYCHO MELGAR

v.

**T.B. BUTLER PUBLISHING
COMPANY, INC., et al.**

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CASE NO. 6:16-CV-362

**ORDER ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

The Report and Recommendation of the Magistrate Judge, which contains her findings, conclusions and recommendation for the disposition of this matter, has been presented for consideration. The Report and Recommendation recommends that the Motion to Dismiss, or alternatively, for More Definite Statement (Docket No. 31) filed by Defendants T.B. Butler Publishing Company, Inc. and T.B.B. Printing Ltd. (the "Tyler Paper Defendants") be **GRANTED-IN-PART** and **DENIED-IN-PART** and that the Motion to Dismiss, or alternatively, for More Definite Statement (Docket No. 32) filed by Defendant Nelson Clyde, IV be **GRANTED**. The Tyler Paper Defendants and Plaintiff filed written objections. Docket Nos. 99, 100.

Plaintiff's written objections concern his discrimination claims. Docket No. 100. The Report and Recommendation recommends denying the Tyler Paper Defendants' motion to dismiss as to Plaintiff's claims for age, disability and national origin discrimination. Docket No. 92. To the extent Plaintiff objects to the dismissal of Nelson Clyde, IV, Plaintiff has not alleged any facts against Clyde in his individual capacity and has not shown that Clyde was his employer as contemplated by Title VII. Moreover, even if Plaintiff had stated a claim against Clyde in his

official capacity, he is also suing the Tyler Paper Defendants. He may not pursue a Title VII claim against both his employer and its agent in his official capacity. *Smith v. Amesdisys, Inc.*, 298 F.3d 434, 449 (5th Cir. 2002).

The Tyler Paper Defendants argue for the first time in their written objections that Plaintiff's claims are barred as a result of his failure to timely exhaust his administrative remedies. The Tyler Paper Defendants' motion to dismiss briefly mentions an untimely Charge of Discrimination with the EEOC,¹ but the motion does not brief the issue and does not seek dismissal on that basis. Defendant waited until after the Report and Recommendation was issued to assert and brief its argument that Plaintiff has not exhausted his administrative remedies, thereby depriving Plaintiff of an opportunity to respond to that issue or for the Magistrate Judge to consider the issue. As a result, it is inappropriate for the Court to consider this new argument during consideration of the Report and Recommendation. *Cupit v. Whitley*, 28 F.3d 532, 535 n.5 (5th Cir. 1994) (a party's entitlement to *de novo* review does not entitle it to raise issues at that stage that were not adequately presented to the Magistrate Judge), *cert. denied*, 513 U.S. 1163, 115 S.Ct. 1128 (1995).

Having made a *de novo* review of the written objections filed by Plaintiff and the Tyler Paper Defendants in response to the Report and Recommendation, the Court concludes that the findings and conclusions of the Magistrate Judge are correct and that the objections are without merit. It is therefore

ORDERED that the Report and Recommendation filed on August 11, 2017 (Docket No. 92) is **ADOPTED**. The Motion to Dismiss, or Alternatively, for More Definite Statement (Docket No. 31) filed by Defendants T.B. Butler Publishing Company, Inc. and T.B.B. Printing Ltd. is

¹ See Defendant T.B.B. Printing, Ltd. and T.B. Butler Publishing Company, Inc.'s Motion for dismiss, or alternatively, for More Definite Statement (Docket No. 31) at 4.

GRANTED-IN-PART and **DENIED-IN-PART**. The motion to dismiss (Docket No. 31) is **GRANTED** as to Plaintiff's claims pursuant to 42 U.S.C. § 1985, the Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 1981, 42 U.S.C. § 1982, 42 U.S.C. § 1983 and 42 U.S.C. § 1986. Therefore, those claims are **DISMISSED**. The motion is **DENIED** as to Plaintiff's claims for age, disability and national origin discrimination. It is further

ORDERED that the Motion to Dismiss, or alternatively, for More Definite Statement (Docket No. 32) filed by Defendant Nelson Clyde, IV is **GRANTED** and the claims asserted against Defendant Nelson Clyde, IV are **DISMISSED WITH PREJUDICE**.

SIGNED this 19th day of September, 2017.

Robert W. Schroeder III
ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE